

JUL 14 2007

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

STEPHANIE ANDERSON,  
Plaintiff,  
vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,  
Defendant.

Civ. No.06-6209-TC

FINDINGS AND RECOMMENDATIONS

Coffin, Magistrate Judge:

Plaintiff, Stephanie Anderson, brings this action for judicial review of a final decision of the Commissioner of Social Security (Commissioner) pursuant to 42 U.S.C. § 405(g). The Commissioner denied Anderson's claim for disability insurance benefits (DIB). For the reasons set forth below, the court recommends that the decision of the Commissioner be reversed and remanded consistent with this opinion.

**PROCEDURAL BACKGROUND**

Anderson filed an application for DIB on March 19, 2001, alleging disability since December 26, 2000 due to a combination of fibromyalgia, degenerative disc disease, somatoform pain

1 disorder<sup>1</sup> and depression. (Tr. 16, 67, 129.) Her application was  
 2 denied initially and upon reconsideration. On March 4, 2004, a  
 3 hearing was held before an Administrative Law Judge (ALJ). In a  
 4 decision dated April 12, 2005, the ALJ found that Anderson was  
 5 not entitled to benefits. (Tr. 27.) When the Appeal's Council  
 6 denied Anderson's request for review on July 7, 2006, the ALJ's  
 7 decision became the final decision of the Commissioner. (Tr. 7.)  
 8 Anderson timely filed this action seeking judicial review.

### 9 STANDARDS

10 A claimant is disabled if he or she is unable "to engage in  
 11 any substantial gainful activity by reason of any medically  
 12 determinable physical or mental impairment which . . . has lasted  
 13 or can be expected to last for a continuous period of not less  
 14 than 12 months." 42 U.S.C. § 423(d)(1)(A). The initial burden  
 15 of proof rests upon the claimant to establish his or her  
 16 disability. Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir.  
 17 1995), cert. denied, 517 U.S. 1122 (1996). The Commissioner  
 18 bears the burden of developing the record. DeLorme v. Sullivan,  
 19 924 F.2d 841, 849 (9th Cir. 1991).

20 The district court must affirm the Commissioner's decision  
 21 if it is based on proper legal standards and the findings are  
 22 supported by substantial evidence in the record as a whole. 42

23  
 24 1

25 The essential feature of Somatoform disorder is one or more  
 26 physical complaints that last for 6 months or more. These  
 27 symptoms cannot be fully explained by any known general  
 28 medical condition, or the physical complaints or resultant  
 impairment are grossly in excess of what would normally be  
 expected from the history, physical examination, or laboratory  
 findings. Diagnostic and Statistical Manual of Mental  
 Disorders, 4th Edition, p. 450-51.

1 U.S.C. § 405(g); see also Andrews v. Shalala, 53 F.3d 1035, 1039  
2 (9th Cir. 1995). "Substantial evidence means more than a mere  
3 scintilla but less than a preponderance; it is such relevant  
4 evidence as a reasonable mind might accept as adequate to support  
5 a conclusion." Andrews, 53 F.3d at 1039. The court must weigh  
6 all of the evidence, whether it supports or detracts from the  
7 Commissioner's decision. Martinez v. Heckler, 807 F.2d 771, 772  
8 (9th Cir. 1986). The Commissioner's decision must be upheld,  
9 however, if "the evidence is susceptible to more than one  
10 rational interpretation." Andrews, 53 F.3d at 1039-40.

#### 11 DISABILITY ANALYSIS

12 The ALJ engages in a five-step sequential inquiry to  
13 determine whether a claimant is disabled within the meaning of  
14 the Act. 20 C.F.R. §§ 404.1520, 416.920. At steps one through  
15 four, the burden of proof is on the claimant. Tackett v. Apfel,  
16 180 F.3d 1094, 1098-1099 (9th Cir. 1999). At step five, the  
17 burden shifts to the Commissioner to show that the claimant can  
18 perform jobs that exist in significant numbers in the national  
19 economy. *Id.* Below is a summary of the five steps, which also  
20 are described in Tackett:

21 Step One. The Commissioner determines whether claimant is  
22 engaged in substantial gainful activity. If so, claimant is not  
23 disabled. If claimant is not engaged in substantial gainful  
24 activity, the Commissioner proceeds to evaluate claimant's case  
25 under step two. 20 C.F.R. §§ 404.1520(b), 416.920(b). In this  
26 case, the ALJ found that Anderson was not engaged in substantial  
27 activity. (Tr. 25.) This finding is not disputed.

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#### 3 Findings and Recommendations

1        Step Two. The Commissioner determines whether claimant has  
2 one or more severe impairments. If not, claimant is not  
3 disabled. If claimant has a severe impairment, the Commissioner  
4 proceeds to evaluate claimant's case under step three. 20 C.F.R.  
5 §§ 404.1520(c), 416.920(c). At step two, the ALJ found that  
6 Anderson had the medically determinable severe impairments of  
7 fibromyalgia and degenerative disc disease, and depressive  
8 disorder/ dysthymic disorder. (Tr. 18-19.) He concluded that  
9 the record did not support a finding of somatoform disorder,  
10 psychosomatic disorder or pain disorder as severe impairments.  
11 (Tr. 19.) This finding is in dispute.

12        Step Three. Disability cannot be based solely on a severe  
13 impairment; therefore, the Commissioner next determines whether  
14 claimant's impairment "meets or equals" one of the impairments  
15 listed in the Social Security Administration ("SSA") regulations,  
16 20 C.F.R. Part 404, Subpart P, Appendix 1. If so, claimant is  
17 disabled. If claimant's impairment does not meet or equal one  
18 listed in the regulations, the Commissioner's evaluation of  
19 claimant's case proceeds under step four. 20 C.F.R. §§  
20 404.1520(d), 416.920(d). At step three, the ALJ found that  
21 Anderson's impairments did not meet or medically equal a listed  
22 impairment. (Tr. 20.) This finding is in dispute.

23        Step Four. The Commissioner determines whether claimant is  
24 able to perform work he or she has done in the past. If so,  
25 claimant is not disabled. If claimant demonstrates he or she  
26 cannot do work performed in the past, the Commissioner's  
27 evaluation of claimant's case proceeds under step five. 20  
28 C.F.R. §§ 404.1520(e), 416.920(e). In this case, the ALJ

1 determined that Anderson had the residual functional capacity at  
2 a sedentary to light level of physical exertion. (Tr. 21, 24.)  
3 Accordingly, the ALJ found that Anderson could perform her past  
4 relevant work as an administrative assistant. (Tr. 26.) This  
5 finding is in dispute. Despite this finding, the ALJ continued  
6 to step five of the analysis because he found that Anderson's  
7 ability to perform all or substantially all of the requirements  
8 of light work was impeded by additional exertional and/or non-  
9 exertional limitations.

10 Step Five. The Commissioner determines whether claimant is  
11 able to do any other work. If not, claimant is disabled. If the  
12 Commissioner finds claimant is able to do other work, the  
13 Commissioner must show a significant number of jobs exist in the  
14 national economy that claimant can do. The Commissioner may  
15 satisfy this burden through the testimony of a vocational expert  
16 ("VE") or by reference to the Medical-Vocational Guidelines, 20  
17 C.F.R. Part 404, Subpart P, Appendix 2. If the Commissioner  
18 demonstrates a significant number of jobs exist in the national  
19 economy that claimant can do, claimant is not disabled. If the  
20 Commissioner does not meet this burden, claimant is disabled. 20  
21 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1). At step five, the ALJ  
22 found that Anderson was able to perform a significant range of  
23 light work. (Tr. 26.) This finding is in dispute.

#### 24 FACTUAL BACKGROUND

25 Anderson was born in 1964 and was 36 years old at the time  
26 of the alleged disability onset. (Tr. 24, 455.) She has an  
27 associates degree in criminology. (Tr. 455.)

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#### 5 Findings and Recommendations

1       The medical records in this case accurately set forth  
2       Anderson's medical history as it relates to her claim for  
3       benefits. The court has carefully reviewed the extensive medical  
4       records, and the parties are familiar with it. Accordingly, the  
5       details of those medical records will be set out below only as  
6       they are relevant to the issues before the court.

#### 7                   DISCUSSION

8       The Commissioner concedes that the ALJ erred in his  
9       assessment of the evidence. The parties disagree on whether this  
10      case should be remanded for further proceedings or remanded for  
11      determination and payment of benefits. Specifically, they  
12      disagree on whether crediting the opinion of Anderson's treating  
13      physician, Laslo Kolta, M.D. mandates a finding of disability.

#### 14      I.   Opinions Of The Treating And Examining Physician

15      Anderson argues that the ALJ erred by failing to credit the  
16      opinion of Laslo Kolta M.D. and erred by failing to give legally  
17      sufficient reasons for rejecting the somatoform pain disorder  
18      diagnosis of Carl Balog, M.D.

19      If a treating physician's medical opinion is supported by  
20      medically acceptable diagnostic techniques and is not  
21      inconsistent with other substantial evidence in the record, the  
22      treating physician's opinion is given controlling weight.  
23      Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001); 20  
24      C.F.R. § 404.1527(d)(2). In general, the opinion of specialists  
25      concerning matters relating to their specialty are entitled to  
26      more weight than the opinions of nonspecialists. id.; §  
27      404.1527(d)(5). An ALJ may reject the uncontradicted medical  
28      opinion of a treating or examining physician only for "clear and

1 convincing" reasons supported by substantial evidence in the  
2 record. id. at 1202 (citing Reddick v. Chater, 157 F.3d 715, 725  
3 (9th Cir. 1998)). If the treating physician's medical opinion is  
4 inconsistent with other substantial evidence in the record,  
5 treating source medical opinions are still entitled to deference  
6 and must be weighted using all the factors provided in 20 C.F.R.  
7 404.1527. id. (citing SSR 96-2p). An ALJ may rely on the  
8 medical opinion of a non-treating doctor instead of the contrary  
9 opinion of a treating doctor only if she provides "specific and  
10 legitimate" reasons supported by substantial evidence in the  
11 record. Id.

12 A. Laslo Kolta, M.D.

13 Dr. Kolta is Anderson's treating physician. In 2001, Dr.  
14 Kolta opined that Anderson could lift 20 pounds occasionally and  
15 5 to 10 pounds frequently; she could walk/stand 1 to 2 hours in  
16 an 8 hour day, and sit 2 to 4 hours. (Tr. 213.) Although Dr.  
17 Kolta noted that his findings were largely based on subjective  
18 complaints, he noted that Anderson could not sit for fifteen  
19 minutes in his office without lying down or moving around. (Tr.  
20 213.)

21 On December 23, 2003, Dr. Kolta sent a letter to Anderson's  
22 attorney reporting that Anderson had been "one of the most  
23 difficult patients in my practice over the last few years because  
24 of the severity of her fibromyalgia and chronic fatigue  
25 syndrome." (Tr. 426.) Dr. Kolta noted that he had sought  
26 multiple consultations for Anderson with other physicians in  
27 various specialties, including neurosurgery and pain  
28 management. (Tr. 426.) He reported that Anderson stayed in bed

1 21 hours per day, was able to get up to eat and for bathroom  
2 breaks, but did not "clothe herself, perform personal hygiene or  
3 activities of daily living [sic]." (Tr. 426.) Dr. Kolta noted  
4 that Anderson took several pain medications. (Tr. 426-27.) He  
5 stated that he "had no doubt that [Anderson was] completely  
6 disabled," and he opined that she was not able to do any  
7 activities that would allow her to maintain even a part-time job,  
8 let alone full employment. (Tr. 427.)

9 In his decision, the ALJ rejected Dr. Kolta's restrictions  
10 and opinion of Anderson being totally disabled. The ALJ stated  
11 that Dr. Kolta's manner of stating that he had "no doubt that  
12 Anderson was disabled" in fact "suggest[ed] doubt." (Tr. 21.)  
13 The ALJ found that Dr. Kolta's statement indicated surprise that  
14 Anderson was disabled based on her diagnoses and noted that Dr.  
15 Kolta described Anderson's symptoms as unusual. (Tr. 21.) The  
16 ALJ noted that Dr. Kolta's residual functional capacity (RFC)  
17 analysis was "marred by its reliance on the claimant's subjective  
18 complaints." (Tr. 21.) The ALJ gave little weight to Dr.  
19 Kolta's opinion that plaintiff was totally disabled. (Tr. 21.)

20 The court finds, and the Commissioner concedes that the  
21 erred by failing to properly credit Dr. Kolta's opinion.

22 B. Carl Balog, M.D.

23 Dr. Balog is an anesthesiologist and pain specialist. On  
24 October 9, 2001, Dr. Balog evaluated Anderson. (Tr. 302-07.) He  
25 diagnosed somatoform pain disorder, depression, and panic  
26 disorder. (Tr. 305.) He ruled out multiple sclerosis prodrome  
27 and fibromyalgia. (Tr. 305.) Dr. Balog recommended decreasing  
28 some of Anderson's pain medications and starting new medications.

8 Findings and Recommendations



1 (Tr. 306.) He suggested psychological counseling, continued  
2 physical therapy and follow-up MRI imaging to "rule out  
3 progressive multiple sclerotic plaques." (Tr. 307.)

4 In considering Dr. Balog's findings, the ALJ wrote:

5 [I]f the claimant has pain due to her degenerative disc  
6 disease as well as due to her fibromyalgia then it is  
7 hardly sensible to determine that she has a somatoform  
8 disorder. And if she does have a somatoform disorder,  
9 then her complaints stemming from her physical  
10 impairments would not be disabling. The claimant has  
11 not established the existence of a somatoform disorder  
12 as a severe impairment.

13 (Tr. 20.) The court finds, and the Commissioner concedes that  
14 the ALJ erred by failing to properly address Dr. Balog's  
15 diagnosis.

## 16 II. Remand For Further Proceedings

17 The Ninth Circuit has established a three-part test "for  
18 determining when evidence should be credited and an immediate  
19 award of benefits directed." Harman v. Apfel, 211 F.3d 1172,  
20 1178 (9th Cir.), cert. denied, 531 U.S. 1038 (2000). Under this  
21 test, the court should grant an immediate award of benefits when:

22 (1) the ALJ has failed to provide legally  
23 sufficient reasons for rejecting such evidence, (2)  
24 there are no outstanding issues that must be resolved  
25 before a determination of disability can be made, and  
26 (3) it is clear from the record that the ALJ would be  
27 required to find the claimant disabled were such  
28 evidence credited.

29 Id. The second and third prongs of the test often merge into a  
30 single question: Whether the ALJ would have to award benefits if  
31 the case were remanded for further proceedings. See id. at 1178  
32 n.2. Generally, an award of benefits is appropriate when no  
33 useful purpose would be served by further administrative  
34 proceedings, or when the record has been fully developed and

1 there is not sufficient evidence to support the ALJ's conclusion.  
2 See Rodriguez v. Bowen, 876 F.2d 759, 763 (9th Cir. 1989). When  
3 outstanding issues must be resolved, a court must remand for  
4 further proceedings. See Bunnell v. Barnhart, 336 F.3d 1112,  
5 1115-1116 (9th Cir. 2003). Where remand would only delay the  
6 receipt of benefits, judgment for the claimant is appropriate.  
7 See Rodriguez, 876 F.2d at 763.

8 Here, it is clear that the first prong of the Harmen test is  
9 met-the ALJ has failed to provide legally sufficient reasons for  
10 rejecting the opinion of plaintiff's treating physician.  
11 However, the Commissioner argues that a remand for further  
12 proceedings is necessary because outstanding issues remain. The  
13 Commissioner argues that the medical record does not clearly show  
14 that Anderson is disabled and that additional proceedings are  
15 necessary to determine Anderson's limitations and to obtain  
16 additional expert testimony about how her limitations impact her  
17 ability to perform jobs. The Commissioner further argues that  
18 further proceedings are necessary to consider Anderson's  
19 credibility. The court disagrees.

20 The court first considers the Commissioner's contention that  
21 further consideration of Anderson's credibility is necessary.  
22 The record does not provide support for the ALJ's credibility  
23 finding. The ALJ found that Anderson's testimony was not  
24 convincing because her "allegations of severe restriction were  
25 not supported by the medical evidence." (Tr. 22.) He noted that  
26 she had been encouraged to increase her activity and, at times,  
27 had reported that she was doing quite well. (Tr. 22.) The ALJ  
28 mentioned plaintiff's failure to comply with prescribed medical

1 treatment-which amounted to failure to get the prescribed number  
2 of vitamin B-12 shots (Tr. 23.) and noted Anderson's high use of  
3 pain medications. None of Anderson's physicians reported that  
4 Anderson was abusing pain medication or malingering. Instead,  
5 most noted that Anderson's pain was not effectively controlled  
6 with her narcotics. (See e.g. Tr. 403.)

7 In discrediting Anderson's testimony, the ALJ relied most  
8 heavily on her attendance at her son's football games and the  
9 third-party testimony that plaintiff was able to cook simple  
10 meals if the ingredients were prepared for her, wipe counters and  
11 wipe off her bathtub and toilet. (Tr. 23.) However, the  
12 overwhelming evidence in the record indicated that plaintiff  
13 spent most of her days in bed, had trouble sitting still for  
14 periods over 15 minutes and was often in pain. "This court has  
15 repeatedly asserted that the mere fact that a plaintiff has  
16 carried on certain daily activities ... does not in any way  
17 detract from her credibility as to her overall disability. One  
18 does not need to be 'utterly incapacitated' in order to be  
19 disabled." Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir.2001)  
20 (quoting Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.1989)).

21 The court next considers whether crediting as true the  
22 diagnosis and findings of Anderson's treating physician Dr. Kolta  
23 mandates a finding of disability.

24 Dr. Kolta's conclusion that Anderson is totally disabled is  
25 a medical rather than a legal conclusion. See Smolen v. Chater,  
26 80 F.3d 1273, 1291 (9th Cir. 1996). Dr. Kolta's conclusion that  
27 Anderson is limited to walking/standing 1-2 hours in an 8 hour  
28 day and limited to sitting 2 to 4 hours in an eight hour day is

1 similarly a medical conclusion. (Tr. 23.) The vocational expert  
2 who testified at Anderson's hearing did not address these  
3 limitations in any hypothetical. The general rule in such  
4 circumstances is a remand for further proceedings. Gamer v.  
5 Secretary of Health and Human Svcs., 815 F.2d 1275, 1281 (9th  
6 Cir. 1987) (superseded by statute on other grounds). However, in  
7 this case, the ALJ addressed the issue of whether the limitations  
8 assessed by Dr. Kolta would render Anderson unable to engage in  
9 any work.

10 During the hearing the ALJ had the following exchange:

11 ALJ: All right. Counsel, with regard to Exhibit  
12 number 9F (Tr. 23), I'll let the record  
13 reflect that rather than repeating the  
14 hypothesis and utilizing the limits in there  
15 that if I were to find those to be credible  
16 and supported by the evidence, that I believe  
17 that as you've already pointed out, the  
18 combination of sit/stand, excuse me,  
19 sit/walk/stand and sit would be at the  
20 maximum 6 hours in an 8 hour day. Is that  
21 your interpretation of that document?

22 Atty: Yes.

23 ALJ: And that is dated May of 2001, and I think  
24 without attempting to enter into the realm of  
25 the vocational expert, we can agree that 6  
26 out of 8 hours is not full time work, is that  
27 correct?

28 Atty: I agree.

ALJ: All right. Let the record reflect also that  
to the degree that there are concrete  
limitations, not prognoses or diagnoses,  
Exhibit number 29 (Tr. 426) suggests that the  
claimant is only able to stay out of bed for  
2 to 3 hours a day, and I think we can agree  
once again that if I were to find that to be  
credible and supported by the objective  
evidence that too would negate all past  
relevant work and any other work in the  
regional or national economy....

(Tr. 475-76.) The ALJ's conclusion that the limitations found by  
Dr. Kolta would render Anderson unable to engage in any work is

1 a legal conclusion of disability. The court finds that it is  
 2 clear from the record that Anderson is unable to sustain  
 3 employment. See Harman, 211 F.3d at 1180. The court concludes  
 4 that this matter should not be remanded for further proceedings.  
 5 See Schneider v. Comm'r, 223 F.3d 968 (9th Cir. 2000).

#### 6 CONCLUSION

7 IT IS RECOMMENDED that this matter be remanded for the  
 8 purpose of permitting the Commissioner to calculate and award  
 9 benefits.

10 These findings and recommendations are submitted to the  
 11 United States District Judge assigned to this case, pursuant to  
 12 the provisions of 28 U.S.C. § 636(b)(1). Within ten days after  
 13 being served with these findings and recommendations, any party  
 14 may file written objections with the court and serve a copy on  
 15 all parties. Such a document should be captioned "Objections to  
 16 Magistrate Judge's Findings and Recommendations." Any reply to  
 17 the objections shall be served and filed within 10 days after  
 18 service of the objections. The parties are advised that the  
 19 failure to file objections within the specified time may waive  
 20 the right to appeal the District Court's order. Martinez v.  
 21 Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 Dated this 14 day of JUNE, 2007

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 26   
 27 THOMAS COFFIN  
 28 United States Magistrate Judge